

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

KAREN SUMMERS,

Plaintiff,

vs.

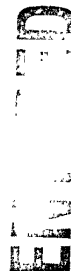
Civil Action No. CV-02-S-2912-NE

DILLARDS, INC., a/k/a CASTNER

KNOTT DRY GOODS CO., d/b/a

DILLARD'S,

Defendant.



JAN 16 2004

MEMORANDUM OPINION

This action is before the court on defendant's motion to dismiss or, in the alternative, to stay the action and to compel arbitration.¹ The court denied defendant's motion in February 2003, relying upon its ruling in a similar case, *Goggins v. Dillard's Inc.*, Civil Action No.: CV-02-S-3216-NE, which held that, because defendant's arbitration rules provide for plaintiff's recovery of attorneys' fees only if she *completely* prevails in the arbitration, the rules undermine her rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*² Defendant appealed to the Eleventh Circuit Court of Appeals,³ which vacated this court's ruling in light of the holding in *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003), and remanded the case to this court for reconsideration of defendant's motion.⁴

¹Doc. no. 3.

²Order of February 28, 2003 (doc. no. 8).

³Notice of Appeal (doc. no. 10).

⁴Doc. no. 23. Similarly, the Eleventh Circuit vacated the court's ruling in *Goggins*. See *Goggins v. Dillard's Inc.*, No. 03-11333, slip op. (11th Cir. September 24, 2003). In its certified order to this court,

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In *Musnick*, the Eleventh Circuit held that "an arbitration agreement is not unenforceable merely because it may involve some 'fee-shifting.'" *Musnick*, 325 F.3d at 1259. Rather, "[t]he party seeking to avoid arbitration under such an agreement has the burden of establishing that enforcement of the agreement would 'preclude' him from 'effectively vindicating [his] federal statutory right in the arbitral forum.'" *Id.* (citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)). *Musnick*'s assertion that being required to pay fees and costs if he did not prevail in the arbitration would deprive him of his Title VII rights was deemed to be "too speculative," because he had not yet been assessed with any fees and might not ever be assessed with any. *Musnick*, 325 F.3d at 1260. A plaintiff in arbitration should first wait to see if he actually is taxed with any fees or costs, then discuss his concerns over the fee-shifting provision with the arbitrator, and finally, if the plaintiff is dissatisfied with the arbitrator's determination, he should seek relief from the district court. *Id.* at 1261.

Based on *Musnick*, the Eleventh Circuit held this court's decision that the fee-shifting provision in defendant's arbitration agreement was too speculative because it was unclear which party may prevail at arbitration and plaintiff may seek judicial review of an award if she feels that her available remedies were hindered.⁵ Upon remand, the court finds that defendant's motion to dismiss or, in the alternative, to stay this action, and to compel

the Eleventh Circuit stated that the court should address the arguments raised in plaintiff's opposition to the motion to compel arbitration, in light of the *Musnick* holding. The court did so, and granted defendant's motion to dismiss and to compel arbitration in *Goggins*.

⁵*Summers v. Dillards, Inc.*, 351 F.3d 1100, 1101 (11th Cir. 2003).

no. 4).⁶ See Summers Affidavit ¶ 2, Exhibit 1A to Plaintiff's Notice of Filing Evidentiary Materials (doc.
⁷ *Id.*
⁸ *Id.* at ¶ 4.
⁹ See *id.* at ¶ 7 and attached exhibit (Acknowledgment of Receipt of Rules of Arbitration).
¹⁰ See *id.* at ¶¶ 4, 6.
¹¹ See *id.* at ¶ 8.
¹² *Id.* at ¶ 16 and attached exhibit (Acknowledgment of Receipt of Rules of Arbitration).

Plaintiff was employed as an area sales manager (ASM) with Castner-Knott department store in Madison Square Mall, in Huntsville, Alabama, when Dillard's purchased the store and began operating it as a Dillard's Department Store.⁶ Plaintiff continued to work as an ASM for Dillard's and was not asked to sign anything concerning arbitration when Dillard's acquired Castner-Knott.⁷ In July 2001, all managers were informed that new hires would be required to sign an arbitration agreement as a condition of employment.⁸ In August 2001, plaintiff signed a document entitled "Acknowledgment of Receipt of Rules of Arbitration" which provided that plaintiff would be subject to the Rules of Arbitration.⁹ Plaintiff maintains that she was informed that the Rules of Arbitration did not apply to current employees and that signing the acknowledgment would not hurt current employees in any way.¹⁰ Plaintiff contends that she never received a copy of the Rules of Arbitration.¹¹ Plaintiff's signed acknowledgment contains a handwritten statement next to her signature that reads "I acknowledge receipt of this Document only."¹²

I. FACTUAL BACKGROUND

arbitration is due to be granted.

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¹⁶See Complaint.¹⁵See attachments to Complaint (doc. no.1).¹⁴*Id.*¹³See *id.* at ¶ 10.

“(1) there must be a written agreement calling for arbitration[;] and (2) the contract in which 985 (1995). Under Alabama law, there are two prerequisites for a valid arbitration contract: *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d The existence of a valid contract to arbitrate is determined by state law. See *First* S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). Under the Act, “any a federal policy favoring arbitration. See, e.g., *Shearson/American Express, Inc. v.* The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA” or “the Act”), establishes

II. DISCUSSION

in the alternative, to stay this action, and to compel arbitration. Ala. Code § 25-1-29 (1975) (2000 Replacement Volume).¹⁶ Defendant moves to dismiss or, in Employment Act, 29 U.S.C. §§ 621, *et seq.*, and the Alabama Age Discrimination Act, filed suit alleging claims under Title VII, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination 2001, and the EEOC issued its notice of right to sue on September 27, 2002.¹⁵ Plaintiff then and long-term disability.¹⁴ She filed a charge of discrimination with the EEOC in November Plaintiff’s last day at work was August 6, 2001.¹³ She was placed on medical leave

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the arbitration agreement appears must relate to a transaction involving interstate commerce.” *Prudential Securities v. Micro-Fab, Inc.*, 689 So. 2d 829, 832 (Ala. 1997) (citation omitted). Plaintiff contends that there is no valid agreement to arbitrate, and alternatively, that any such agreement to arbitrate was fraudulently induced.

A. Enforceable Written Arbitration Agreement

First, a written agreement calling for arbitration exists. Plaintiff signed a written “Acknowledgment of Receipt of Rules of Arbitration”¹⁷ The Acknowledgment states as follows:

EFFEFFECTIVE immediately all employees (as hereinafter defined) of Dillard’s, Inc., its affiliates, subsidiaries and Limited Liability Partnerships (the “Company”) shall be subject to the RULES OF ARBITRATION (The “Rules”) described below. Employees are deemed to have agreed to the provisions of the Rules by virtue of accepting employment with the Company and/or continuing employment therewith.¹⁸

Plaintiff contends that she did not enter into a valid contract with defendant because the essential elements of a contract (offer, acceptance, consideration, and mutual assent) were not present. Plaintiff’s argument fails in all respects. Defendant offered plaintiff the right to continued employment if she agreed to the arbitration rules, and plaintiff accepted that offer when she signed the Acknowledgment of Receipt of Rules of Arbitration and continued working for defendant. *See Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 733-34 (Ala. 1987) (recognizing formation of unilateral contracts through employment policies or

¹⁷See Summers Affidavit at ¶ 7 and attached exhibit (Acknowledgment of Receipt of Rules of Arbitration).
¹⁸*Id.* (attached exhibit).

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¹⁹*Id.* at ¶ 16 and attached exhibit (Acknowledgment of Receipt of Rules of Arbitration).
²⁰*Id.* at attached exhibit (emphasis supplied).

Plaintiff also argues that she was fraudulently induced to enter into the arbitration agreement. "Fraud in the inducement consists of one party's misrepresenting a material fact concerning the subject matter of the underlying transaction and the other party's relying on

B. Fraudulent Inducement

(Ala. 2002). Accordingly, a written agreement to arbitrate exists. 1307, 1315 (11th Cir. 2002); *Potts v. Baptist Health System, Inc.*, 853 So. 2d 194, 204-05 S. Ct. 1647, 114 L. Ed. 2d (1991); *see also Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1302, 149 L. Ed. 2d 234 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 employment. *See generally Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. well-settled that an employer *can* legally make compulsory arbitration a condition of continued employment with defendant manifests her assent to the terms of arbitration. It is employment with the Company and/or continuing employment *therewith*." ²⁰ Thus plaintiff's "Employees are deemed to have agreed to the provisions of the Rules by virtue of accepting acknowledge receipt of this Document only," ¹⁹ the "Document" stated in express terms that "I received a copy of the arbitration rules, and noted on the acknowledgment that "I the agreement. *See id.* at 734. Although plaintiff makes much of the fact that she never after being notified of the arbitration rules, provides the consideration necessary to support are adopted after the employee has been hired). Plaintiff's choice to continue employment, employee handbooks coupled with continuation of employment, even if the arbitration rules

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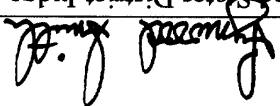
Plaintiff entered into a valid, enforceable arbitration agreement with defendant, pursuant to which she is required to submit all of the claims made the basis of this lawsuit to arbitration. Accordingly, defendant's motion to dismiss or to stay, and to compel arbitration, is due to be granted. An order consistent with this memorandum opinion will be entered contemporaneously herewith.

III. CONCLUSION

such, plaintiff cannot argue that she was fraudulently induced. As she was bound to arbitration she would have terminated her employment with defendant. As of action binding her to the rules of arbitration. Plaintiff does not argue that had she known resulting in her detriment. But plaintiff's continued employment with defendant is the course acknowledgment waiving her right to litigate in a court of law as the course of action. Thus, plaintiff points to signing the Acknowledgment of Receipt of Rules of Arbitration. Plaintiff argues that had she known that the arbitration rules would apply to her, she would never have signed the detriment as a result of this misrepresentation of a material fact. Plaintiff argues that had she current employees, plaintiff must further show that she took a course of action to her that defendant misrepresented a material fact, i.e., the applicability of the arbitration rules to *Reynolds v. Mitchell*, 529 So. 2d 227 (Ala. 1988)). Assuming plaintiff's assertions are true of action." *Oakwood Mobile Homes, Inc. v. Barger*, 773 So. 2d 454, 459 (Ala. 2000) (citing the misrepresentation to his, her, or its detriment in executing a document or taking a course

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DONE this 15th day of January, 2004.



United States District Judge